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No. 722

In The

Supreme Court of the United States

October Term, 1956

George A. Landell, Executor, etc. et al.,
Petitioners,

v.

Northern Pacific Railway Company,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 1957.

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Statute Involved 7

Statement 7

Reasons for Granting the Writ 11

1. Lack of procedural due process and of jurisdiction 11
2. Lack of substantive due process and statutory nullification 18
3. Equitable considerations and respondent's inconsistent positions 21
4. Importance of the case 22

Conclusion 25

Appendix A—Constitution, Statute and Rules 26

Appendix B—Opinion and Judgment Below 31

Appendix C—Excerpt from "Public Aids to Transportation", Section of Research, Federal Coordinator of Transportation, G.P.O. (1938) vol. 2, page 102 .....21, 33

Citations

Cases:

Anderson v. *Abbott*, 321 U.S. 349 (1944) 21

Arnstein v. *Porter*, 2 Cir., 154 F. 2d 464 (1946) 17

Bell v. *Hood*, 327 U. S. 678 (1946) 22

Calhoun v. *Massie*, 253 U. S. 170 (1920) 20

Central Transportation Company v. *Pullman's Palace Car Co.*, 139 U. S. 24 (1891) 21

PAGE

Chastleton Corporation v. *Sinclair*, 264 U.S. 543 (1924) 16
Chesapeake & Ohio Ry. Co. v. *Miller*, 114 U.S. 176 (1885) 21
Ewert v. *Bluejacket*, 259 U.S. 129 (1922) 24
Fountain v. *Filson*, 336 U.S. 681 (1949) 12, 13
Hansberry v. *Lee*, 311 U.S. 32 (1940) 13
Hoover v. *Northern Pacific Railway Company, et al.*, (U.S.D. Ct. So. D., N.Y., 1939, unreported, copy at pp. 165 et seq., Record in No. 299, 350 U.S. 844) 5, 13, 18
Hovey v. *Elliott*, 167 U.S. 409 (1897) 14
Kennedy v. *Silas Mason Co.*, 334 U.S. 249 (1948) 13
Klapprott v. *U.S.*, 335 U.S. 601 (1949) 15
Landell, etc. et al. v. *Northern Pacific Railway Company*, D.C., 98 F. Supp. 479 (1951) 2, 8
Landell, etc. et al. v. *Northern Pacific Railway Company*, D.C., 122 F. Supp. 253 (1954) 2, 8, 17
Landell, etc. et al. v. *Northern Pacific Railway Company*, D.C., 223 F. 2d 316 (1955) 2, 9
Landell, etc. et al. v. *Northern Pacific Railway Company*, 350 U.S. 844 (1955), reh. den. 350 U.S. 905 (1955) 2, 6, 7, 9
Landell, etc. et al. v. *Northern Pacific Railway Company* (Order of D.C. Cir., November 19, 1954 unreported) 2, 9, 14, 32
Messenger v. *Anderson*, 225 U.S. 436 (1912) 14
Minnesota Rate Cases, 230 U.S. 352 (1913) 6
Morgan v. *United States*, 304 U.S. 1 (1938) 12
Northern Pacific Railway Co. v. *Boyd*, 228 U.S. 482 (1913) 21
Northern Pacific Railway Company v. *U.S.*, 330 U.S. 248 (1947) 20
Oregon & California Railroad Co. v. *U.S.*, 238 U.S. 393 (1915) 21, 24
Panama Refining Co. v. *Ryan*, 293 U.S. 338 (1935) 12

PAGE

Postal Telegraph Cable Co. v. *Newport*, 247 U.S. 473 (1917) 12
Remington v. *Central Pacific R.R. Co.*, 198 U.S. 95 (1905) 16
Reynolds v. *Stockton*, 140 U.S. 254 (1891) 12
Roberts v. *Northern Pacific Railroad Company*, 158 U.S. 1 (1895) 20, 24
Sacher v. *U.S.*, 343 U.S. 1 (1952) 22
Sartor v. *Arkansas Gas Corp.*, 321 U.S. 620 (1944) 13
Southern Pacific Company v. *Bogert*, 250 U.S. 483 (1919) 16
Standard Oil Co. v. *Missouri*, 224 U.S. 270 (1912) 12
U.S. v. *Darby*, 312 U.S. 100 (1941) 21
U.S. v. *Dunn*, 268 U.S. 121 (1925) 16
United States v. *Northern Pacific Railroad Company*, 8 Cir., 1899, 95 Fed. 864, aff'd 177 U.S. 435 (1900) 19

Constitution, Statutes and Rules:

Constitution, Amendment V 7
Act of July 2, 1865, 13 Stat. 365, as amended 7, 19
Act of June 25, 1929, Section 4, c 41, 46 Stat. 41 11
11 D.C. Code, Secs. 301, 305, as amended 8
Federal Rules of Civil Procedure
Rule 26 ..... 7, 17
Rule 54 ..... 7, 9
Rule 56 ..... 7, 12, 13, 23
Rule 60(b) 7, 9, 14, 15

Miscellaneous:

Barron and Holtzoff, Federal Practice and Procedure, 1950 Ed., vol. 2, sec. 655 17
Public Aids to Transportation, Section of Research, Federal Coordinator of Transportation, G.P.O. (1938) vol. 2, p. 102 ..... 21, 33
31 American Jurisprudence, Judgments, sec. 639 16

PAGE

Moore and Rogers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623 (1946) 16

Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946) 24

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

George A. Landell, executor, Robert W. Lishman, trustee, and the Committe of Minority Stockholders, solely as a committee, on behalf of themselves and of other minority stockholders of the Northern Pacific Railroad Company, a Federal railroad corporation with valuable franchises, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on October 11, 1956, affirming the December 21, 1955 order of the United States District Court for the District of Columbia denying relief from the operation of a summary judgment of dismissal based on alleged laches.

OPINIONS BELOW

The December 21, 1955 order of the United States District Court for the District of Columbia denying petitioners' motions to review taxation of costs and to set aside, vacate, modify or correct the summary judgment dismissing the complaint, was made without opinion (R. 43). The per curiam opinion of the United States Court of Appeals for the District of Columbia Circuit, is not yet reported. It, together with the Judgment, is printed in Appendix B hereto, infra, pp. 31, 32.

The order of the Court of Appeals dated November 19, 1954, denying without prejudice petitioners' motion to exclude from printing in the joint appendix certain material designated by the respondent is also printed in Appendix B hereto, infra p. 32.

The summary judgment of the District Court was made on June 29, 1954 (R. 2). The order on the mandate affirming this judgment was filed November 23, 1955 (R. 5). Petitioners' motions to review taxation of costs and to vacate, modify or correct the summary judgment were filed on November 28, 1955 (R. 6).

The earlier opinions in this case by different judges of the District Court (98 F. Supp. 479; 122 F. Supp. 253), and by the Court of Appeals (223 F. 2d 316), are contained in Appendix A pp. 1a et seq., 8a et seq., to the petition for certiorari No. 299, October Term, 1955 of this Court (350 U.S. 844), hereinafter referred to as "Pet. 1."

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 11, 1956 (R. 46). A timely petition for rehearing was denied on November 2, 1956 (R. 73). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a complaint by petitioners, holders of about 3% of the stock, against respondent, managing stockholder and holder of 97% of the stock of the Federal Railroad corporation, seeking to have the courts define the franchise and other assets of the corporation and enforce the statutory and fiduciary accountability of the respondent for its use and management of the assets, is subject to a summary judgment of dismissal for laches which denies petitioners the opportunity of litigating the following disputed issues: (a) that the facts necessary for laches and its applicability are not present; (b) that the Federal corporation has valuable federal franchises and immunities granted solely to it by Congress and other assets of great value; (c) that the respondent is unlawfully keeping to itself all the benefits of such franchises and other assets; and (d) that in order to continue its unlawful use of such franchises and other assets and to procure immunity from suit, the respondent has used and is using the forms of legal procedure as an unlawful device to make itself appear to be the owner of the franchises and other corporate assets and to make it further appear that the Federal corporation in question is a bankrupt entity against which the respondent holds an alleged unsatisfied judgment in excess of $100,000,000.

2. Whether petitioners, who moved under Rule 60(b)(6) of the Federal Rules of Civil Procedure for relief from the operation of the summary judgment, are required under the Rule to prove that the judgment was fraudulently procured, or are they entitled to relief when the record and the pleadings [1] establish that the following circumstances are present:

---

[1] The pleadings are printed on pages 1 et. seq., of the Record in Pet. 1.

a. The summary judgment record on which the decision below is based contains a treacherous mass of misleading, nonevidentiary material and the case has never been placed in proper condition for appellate consideration despite petitioners' efforts in the courts below (R. 8, 23, 34, 35, 40, 50-55).

b. The Court of Appeals by order dated November 19, 1954, denied petitioners' motion (Appendix B, infra, p. 32) to exclude voluminous, nonevidentiary material from printing in the Joint Appendix "without prejudice to the right of counsel for appellant to file a motion to tax costs for printing unnecessary portions of the record after hearing and disposition of this appeal." This material was chiefly composed of exhibits caused to be marked by respondent for identification only upon a deposition which was used in violation of Rule 26 of the Federal Rules of Civil Procedure. These exhibits were presented to the appellate court by the respondent as evidence and labelled by respondent in volume 2 of the Joint Appendix and caused to be printed by it therein as "Exhibits." The words on the back of each such "exhibit" saying: "Defendant's Exhibit for Identification" were deleted without explanation (R. 8, 23, 49-52, 61). Respondent has thus been allowed to load the summary judgment record with an unchecked hand and this material has been used as the basis for the summary judgment and appellate decision (R. 8, 23, 48-52, 58, 61, 62). The circumstances herein are such that the motion under Rule 54(d) to review the taxation of costs for the printing of excessive and non-evidentiary material, as well as the motion under Rule 60(b)(6), necessarily involve a fundamental due process attack upon the summary judgment and its affirmance by the Court of Appeals. See infra, p. 11.

c. The decision below is based upon: (1) refusal to give effect to governing legislation and to well pleaded allegations of fact in the complaint, (2) numerous, undisputedly, erroneous statements of material fact contained in the summary judgment opinion (R. 11-25), (3) errors of law depriving petitioners of fundamental rights (R. 8, 48, 50, 53-58, 63, 65), (4) findings in a summary judgment opinion of disputed material facts, and (5) reliance upon undisputedly,

erroneous statements made to the courts by the respondent (R. 34-39, 64, 65).

d. The decision below denies petitioners the opportunity to prove at a trial, by respondent's records and otherwise, that a decree of 1896 against the Federal corporation procured by and relied upon by respondent, is neither conclusive of petitioners' statutory property rights, nor a bar to the relief prayed for.

e. The summary judgment below and the denial of the motion for relief from its operation unlawfully adjudicates the contested issue that the principal precedent relied upon by the courts below, (unreported 1939 decision in the *Hoover* case), to support the charge of petitioners' laches was a sham decision obtained collusively by suppression of material, evidence in possession of both parties to that case when it was decided, and that petitioners were not aware of this suppression before bringing the current action (R. 9, 10, 17-20, 36).

f. The District Court's summary judgment opinion misapprehends and misstates the cause of action alleged by the complaint (R. 12-16, 53, 62) and misstates material facts as developed by the pleadings and the record, in determining the applicability of the principal precedent relied upon (R. 17-25, 36). The decision that the opinion was "careful" is plainly obstinate error.

g. The decision below denies petitioners their fundamental right to an adjudication of the following matters in dispute: (1) whether respondent is now lawfully using the assets of the Federal corporation, (2) whether it is misleadingly using the forms of legal procedure to make itself appear to be such lawful user and to keep itself immune from effective litigation (R. 15, 16, 40, 48, 52, 54, 60, 62, 65) and (3) whether the reorganization of the Federal corporation commenced in 1896, in which no provision was made for minority shares, is yet complete in view of the federal statute, the refusal of Congress to authorize respondent's succession, and of respondent's own actions in keeping alive and using the Federal corporation's charter, franchises, stocks, bonds and other securities.

h. The decision below nullifies the provisions contained in the federal statute incorporating the petitioners' company which prohibits the transfer to respondent of its charter powers, privileges and franchises and vests continuing property rights in the petitioners (R. 13, 53, 56, 63).

3. Whether the rule of "law of the case" serves to bar the petitioners from relief from the operation of the decision below in the light of the foregoing and the following facts and circumstances:

a. Petitioners or their predecessors never declined an offer to participate in the reorganization upon the same terms as all other stockholders. They were frozen out by insider stockholders and others intent on using the forms of legal procedure to acquire for respondent en bloc, 35,000,000 acres of the public domain contrary to statute and to pocket the assessments levied upon non-insider stockholders (R. 37, 38). Yet the respondent in its brief pages 1, 2 in this Court opposing the first petition for certiorari (No. 299, 350 U.S. 844), with no basis in, and directly contrary to the record, and contrary to the admission in its Answer herein (R. 37, 38), and to its testimony contained in the record in this Court in another case (*Minnesota Rate Cases*, 230 U.S. 352 (1913), defendant's Exhibit Y, Gray, Volume IX of printed record therein; see R. 37, 38, 64), erroneously and misleadingly stated to this Court that:

"On motion for summary judgment below, it was established by undisputed documentary evidence[2] coming largely from petitioners' own files: (a) that petitioners or their predecessors had declined an offer to participate in the reorganization upon the same terms as all other stockholders. . ."

b. Subsequent to the summary judgment and to the denial of certiorari by this Court (350 U.S. 844), respondent has continued to use the Fed-

[2] At page 14 infra, petitioners state facts showing the misleading and prejudicial nature of the words "undisputed documentary evidence." Respondent has made no attempt to show the truth of its statement. It is reasonable to conclude that it was an intentional misstatement, designed to prejudice this Court's view of the nature of this case (R. 64).

eral corporation's charter, privileges, and franchises and has caused notices of stockholders' meetings of the Federal corporation to be sent to petitioners (R. 10, 56).

CONSTITUTIONAL PROVISIONS, STATUTE AND RULES INVOLVED

The constitutional provisions involved are those in Amendment V and are printed in Appendix A, infra, p. 26.

The statutory provisions involved are the Act of July 2, 1864 (13 Stat. 365), as amended. They, together with the provisions in Rule 56 of the Federal Rules of Civil Procedure, are printed in Appendix B to Pet. 1, pp. 20a et seq.; pp. 38a, 39a.

The other Rules involved, namely, Rules 26, 54(a), (d) and 60(b) of the Federal Rules of Civil Procedure are printed in Appendix A, infra, pp. 26 et seq.

STATEMENT

This case is here for the second time, see 350 U.S. 844. On December 20, 1950, petitioners, who are holders as executor and trustees of about 3% of the outstanding stock of the Northern Pacific Railroad Company, a Federal railroad corporation, brought this action against respondent, a Wisconsin corporation, holder of 97% of the Federal corporation's stock.

Petitioners invoked the jurisdiction of the United States District Court for the District of Columbia on the ground that the Act of July 2, 1864, 13 Stat. 365, as amended, (printed in Appendix B to Pet. 1), granted valuable franchise and other assets solely to railroad and that, in violation of this statute and in breach of its fiduciary duty toward the minority, respondent is using and enjoying these assets without making any compensa-

tion therefor to the Federal corporation or to the petitioners. Petitioners also invoked the general equity jurisdiction of the District Court under 11 D.C. Code, Sections 301 and 305, as amended, and sought a decree defining the assets of the Federal corporation, the extent of the petitioners' interest therein and the extent of the fiduciary liability of respondent for its holding and management of the Federal corporation's charter powers, franchises and privileges.

The complaint alleged that respondent is incompetent to be and is not the lawful successor to the Federal corporation (R. 12-16). It alleged that by use of the forms of legal procedure, respondent contrived to make itself appear to be such successor and thereby manage and enjoy the federally granted railroad franchises and other assets with immunity from effective litigation (R. 12-16, 39, 53, 59, 60). The complaint also alleged that from 1896 to date respondent "has planned and conducted its business and mortgage financing in a manner so as to keep itself in a position of ability to transfer and convey the railroad of Northern Pacific Railroad Company it purportedly acquired in the years 1896 to 1899 back to said Federal corporation now dominated and controlled by it." (R. 58). The answer "specifically" denied this allegation (R. 58). Since the case was last here, respondent has used the Federal corporation's franchises and other assets and has caused notices of stockholders' meetings of the Federal corporation to be sent to petitioners (R. 10, 49, 56).

On March 9, 1951 the District Court, with an opinion by Judge McLaughlin (98 F. Supp. 479), denied respondent's motion to dismiss the complaint.

On June 23, 1954 the District Court, with an opinion by Judge Tamm (122 F. Supp. 253), granted respondent's motion for summary judgment and dismissed the complaint for laches.

On November 19, 1954 the Court of Appeals for the District of Columbia Circuit (Stephens, Chief Judge, Bazelon and Danaher, Circuit Judges) denied without prejudice petitioners' motion to exclude from printing certain material designated by the respondent (Appendix A, infra, p. 32).

On April 14, 1955 the Court of Appeals (Circuit Judges Prettyman, Bazelon and Bastian) affirmed the summary judgment in a short, per curiam opinion (223 F. 2d 316). On May 11, 1955, that court denied a petition for rehearing.

On October 10, 1955, No. 299, 350 U.S. 844) this Court denied petitioners' application for certiorari and on November 21, 1955 denied the petition for rehearing (350 U.S. 905).

On November 23, 1955 there was entered on the docket of the District Court an order on the mandate of this Court affirming the summary judgment of the District Court dismissing the complaint with costs (R. 5).

On November 28, 1955 petitioners, as they were entitled to do under the law and under the aforesaid order without prejudice of November 19, 1954, filed two motions in the District Court. One was under Rule 54 to review taxation of costs and the other was under Rule 60(b) to secure relief from the operation of the summary judgment (R. 6).

On December 21, 1955 Judge Tamm entered the order, without opinion, denying petitioners' two motions (R. 43).

On October 11, 1956 the Court of Appeals in another short-shrift, per curiam opinion (Appendix A, infra, p. 31), affirmed the December 21st order. On November 2, 1956, that court denied a petition for rehearing (R. 47, 73).

Petitioners' theory of the case is one which would enable this litigation to be narrowed, simplified and perhaps

to be disposed of at a pre-trial conference. A federal statute, still in effect, gives petitioners property rights in valuable assets of the Federal railroad corporation. These assets are the charter, right of way and franchises granted by Congress solely to Northern Pacific Railroad Company. Respondent is using and enjoying the benefits of these inalienable assets without making any payment to the Federal corporation which it holds and uses as a captive to do its bidding. To make its possession, management and enjoyment of these assets appear lawful and to procure immunity from effective litigation, respondent has used and is using the forms of legal procedure as a device, cover and shield. The infirmity of the summary judgment and of the decision below is that each constitutes a violation of petitioners' fundamental right to the observance of the federal statute, to a fair hearing and to an appellate review of the genuine issues of material fact and law, going not only to the question of the existence of laches, but also to its applicability. Where undisputed facts set forth in the second appeal record make a clear showing that the earlier adjudication was plainly wrong, it is manifestly unjust to apply the self imposed rules of repose or of law of the case.

Respondent's theory of the case, which was accepted by the District Court, is that petitioners' cause of action arose in 1896 and that a fair trial could not now be had because all participants in the reorganization are dead. Respondent successfully contended that the court should not be concerned with whether the provisions in the federal statute are now operative, or whether respondent has legal title to the Federal corporation and its franchise and other assets noted above. In its briefs below, and on oral argument before the District Court on the motion for summary judgment, respondent stated that it was "not in order" to discuss or consider these matters (R. 40). Its counsel told the District Court (R. 56): "I am not here now to maintain whether the 1896 reorganization was legal or not. . ." He also stated that "whether

it gives us valid, legal title or not, at the present time[3], it is not necessary to consider."

The decision below, when sufficiently scrutinized, rests upon the specious basis that respondent is not obliged to meet any issue or fact which it does not feel is "in order." See infra, p. 24.

The decision of the court below states that Landell appealed from the summary judgment "using as procedural justification the feature of costs." Infra, p. 31. This statement loses sight of the vital contention that respondent loaded the record with a mass of misleading, nonevidentiary material which the District Court used as the basis for the summary judgment. Furthermore, the decision overlooks the order of November 19, 1954, which provided ample justification for the present appeal (R. 49-52, see supra, p. 4).

Petitioners now petition this Court for a writ of certiorari to the Court of Appeals, for the reasons set forth below:

REASONS FOR GRANTING THE WRIT

1. Lack of Procedural Due Process and of Jurisdiction. The decision of the court below states that the questions are no longer open whether the summary judgment: (a) adjudicated genuine issues of material fact, (b) was based upon material never offered in evidence, and (c) upon undisputedly, erroneous statements of fact contained in the opinion itself. The decision also holds that petitioners, in order to obtain relief from the operation of the summary judgment, must establish that there was fraud in its procurement, infra, p. 31. Petitioners contend that the decision deprives them of procedural due

[3] Footnote supplied. Section 4, Act of June 25, 1929, c. 41, 46 Stat. 41, Appendix B, p. 36a to Pet. 1, recognizes that the Federal corporation has "present title" to the right of way.

process, misconstrues the provisions contained in Rule 60(b), is in direct conflict with governing decisions of this Court, is beyond the court's jurisdiction and constitutes a miscarriage of justice.

a. The minimum requirements of due process are that no man shall be condemned in his person or his property without a hearing or trial wherein he has had fair opportunity to test as to its truth, relevancy or competency the material used against him. In the present case the summary judgment uses nonevidentiary material and makes findings of disputed facts which findings were not made known to petitioners until the District Court issued its opinion and judgment. The findings of disputed facts, the use of nonevidentiary material and the approval of such procedure by the Court of Appeals is a denial of due process. See *Morgan* v. *United States,* 304 U.S. 1, 17, 19, 20 (1938).

In *Fountain* v. *Filson,* 336 U.S. 681, 683 (1949) this Court stated part of the governing law which has been ignored in the present case: "Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact." The decision below is that the District Court may adjudicate disputed material facts and in a summary judgment opinion make findings of fact contrary to well pleaded allegations in the complaint.

The findings of fact contained in the summary judgment opinion, moreover, violated the principle that findings of fact, to be valid, must be based upon evidence in the record. *Postal Cable Co.* v. *Newport,* 247 U.S. 473, 474 (1917), *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 432 (1935).

The summary judgment is not entitled to the merit and finality of an adjudication between the parties because it is unresponsive to the pleadings (R. 12-16, 23-25, 39, 40, 52, 55, 56, 58, 61). *Reynolds* v. *Stockton,* 140 U.S. 254, 264, 265, 268 (1891), *Standard Oil Co.* v. *Missouri,* 224 U.S.

270, 281 (1912). There is a serious additional question as to the judgment's validity. The jurisdiction of the District Court is limited to granting summary judgment to cases wherein there are no triable issues, and the moving party "is entitled to a judgment as a matter of law" (Rule 56 (c)). The statute provides present property rights in the petitioners. Respondent was not entitled to a judgment based upon the exclusion of the federal statute from the case. The court, moreover, had no jurisdiction to enjoin enforcement of the statute or to render judgment contrary to its terms. It cannot achieve the same non-jurisdictional result by indirection.

The summary judgment, furthermore, fails to make findings concerning the most vital issues in the case, all of which were in sharp dispute, namely, (1) the factual elements of laches and whether the facts herein are susceptible to the claim of laches; (2) whether petitioner has title to the charter and franchises of the Federal corporation and is now lawfully using same; (3) whether respondent has conducted its affairs with deference to the rights of the minority stockholders; (4) whether by misuse of the forms of legal procedure respondent has hindered and prevented the commencement of effective litigation against it (R. 59); (5) whether the 1939 unreported, alleged class action *Hoover* case relied upon by the courts below was a sham decision obtained by collusive suppression of basic documentary evidence then in possession of both parties (See supra p. 5). See *Hansberry* v. *Lee*, 311 U.S. 32, 45 (1940).

b. The decision below that the District Court may adjudicate issues in a summary judgment proceeding under Rule 56 and make findings of material fact which have no basis in the record, deprives petitioners of their fundamental right to a fair trial and a trustworthy appellate record and is in direct conflict with the decisions of this Court (See R. 52, 55, 57-60). *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 627 (1944); *Kennedy* v. *Silas Mason*

Co., 334 U.S. 249, 256, 257 (1948); *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949), see *Hovey* v. *Elliott*, 167 U.S. 417, 418 (1897).

c. The decision below holding: (1) that this case is not in proper posture to permit attack upon the summary judgment, (infra, p. 31) and (2) that petitioners in order to obtain relief from its operation must under Rule 60(b) (6) establish that the judgment was fraudulently procured is in direct conflict with applicable decisions of this Court.

(1) Rule of law of the case. The decision that the rule of law of the case prevents the present attack upon the summary judgment is in conflict with *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912).

In determining whether the rule of law of the case precludes the present proceedings, this Court, we respectfully urge, should take the following matters into consideration. What respondent described to this Court in its brief opposing the first certiorari petition as "undisputed documentary evidence" (supra p. 6) is material which respondent was permitted to inspect prior to the summary judgment motion and was never offered in evidence (R. 8, 23, 51). Much of this material respondent already had in its own files. Respondent had this material marked for identification purposes only upon the deposition herein. Judge Tamm was asked to exclude it as irrelevant and incompetent and not properly vouched for (R. 23, 49, 50). No ruling was made upon this request (R. 51). As noted above, the Court of Appeals denied without prejudice petitioners' motion to exclude a large volume of same from printing in the Joint Appendix (R. 23, 50-52,). Had the case reached this court on the merits, respondent would have found it impossible to comply with Rule 40, 2. of the Rules of this Court requiring its brief, when referring to an exhibit, to indicate "both the page number at which the exhibit appears and at which it was offered in evidence. . ." The District Court acted con-

trary to this rule. Thus the summary judgment opinion uses as "Lishman Deposition, p. 180, Exhibit 100" (R. 23) a 1916 letter from Mr. McCullen to Mr. Stetson. This letter, contrary to Judge Tamm's reference to it as an "exhibit", was never offered in evidence. As shown at page 180 of the deposition it was marked solely for identification as appears from the following statement thereon: "Thereupon a letter dated March 29, 1916 from Mr. McCullen to Mr. Stetson was marked by the Reporter 'Defendant's Exhibit No. 100 for Identification.'" For the District Court to refer to and use this paper marked for identification as an "exhibit", and for the respondent to describe this type of material as "undisputed documentary evidence", was misleading and substantially prejudicial to petitioners' fundamental right to a fair hearing and to an appellate review free from deceptive misstatements concerning the question presented (R. 37-39). The summary judgment opinion, contrary to the complaint, uses this letter "exhibit" to determine that the cause of action was one for concealed fraud concerning which petitioners had offered no satisfactory excuse for their failure to sue R. 22, 23, see 9). This use misapprehends the complaint allegations of fact setting forth respondent's misuse of the forms of legal procedure to make itself appear to be the lawful successor to the Federal corporation and to hinder the institution of costly litigation against powerful interest in the face of odds which respondent, by a propaganda campaign over the years, had made to appear as hopeless.

(2) Rule 60(b)(6). The decision below that petitioners must prove that the summary judgment was fraudulently procured in order to obtain relief from its operation is in direct conflict with *Klapprott* v. *U.S.*, 335 U.S. 601, 610, 615 (1949). In the *Klapprott* case this Court stated, " . . . Petitioner is entitled to a fair trial. He had not had it. The Government makes no claim that he has. Fair hearings are in accord with elemental con-

cepts of justice, and the language of the 'other reason clause' of 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing."

Furthermore, the rule is that relief from the operation of a judgment can be obtained without the necessity of proof of fraud.[4]

Thus in *Remington* v. *Central Pacific R.R. Co.*, 198 U.S. 95 (1905) this Court said, at pages 99-100: "If the Circuit Court was satisfied that it, or its predecessor state court, had made a mistake, it had power to reopen the matter."

In *Chastleton Corporation* v. *Sinclair*, 264 U.S. 543, 547 (1924) Mr. Justice Holmes pointed out: " . . . a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . ."

See 31 Am. Jur., Judgments, sec. 639.

Our courts have the inherent power, and, under certain circumstances, the duty of self correction of an erroneous adjudication, even in the absence of a showing of fraud in its procurement. Moore and Rogers, *Federal Relief from Civil Judgments*, 55 Yale L. J. 623, 624-626, 664 (1946). The *undisputed* cincumstances herein require that in the interests of justice this power should now be exercised.

d. The decision below holding that the summary judgment cannot now be attacked on the ground that it uses

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[4] It should be noted that, like the plaintiffs in *Southern Pacific Company* v. *Bogert*, 250 U.S. 483, 487, 492 (1919), the petitioners sought to hold respondent accountable as a fiduciary, majority stockholder. In order to obtain the relief prayed for in the complaint, fraud need not be proved. "It is sufficient to establish that the fiduciary has exercised his power for his own benefit without more." *U. S.* v. *Dunn*, 268 U.S. 121, 131 (1925) Since the summary judgment, respondent has been using and enjoying the assets of the Federal corporation without compensation therefor (R. 10, 11, 56).

a deposition in violation of Rule 26 and relies upon papers caused to be marked by respondent for identification purposes only is erroneous. In using the Lishman deposition the District Court made none of the findings required by Rule 26(d)(3) (R. 8, 50.)

Respondent contends that the deposition was properly used by the court because deponent Lishman was a party (R. 29).[5] In addition, respondent states that its use was not objected to at the summary judgment motion hearing and that, in any event, the appendix to the appellants' brief in the Court of Appeals contained 16 pages of excerpts from the deposition (R. 29, 30, but see 23, 51).

Respondent offered no explanation as to why the voluminous papers it caused to be marked for identification purposes upon the deposition were caused to be labelled by it as exhibits in the printed record.

The inclusion of 16 pages of excerpts in the appellants' appendix was to establish that the taking of the Lishman deposition "was in part for the purpose of finding out whether the plaintiff committee had a copy of the unprinted exhibit submitted by defendant in 1926 to the Joint Congressional Investigating Committee" (R. 36). This exhibit showed that respondent's own 1896 records[6] listed Hoover as a consenting stockholder to the reorganization. At the time of the insistent questioning of de-

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[5] *Arnstein* v. *Porter*, 2 Cir., 1946, 154 F.2d 464, 471, 472; Barron and Holtzoff, Federal Practice and Procedure, 1950 ed., vol. 2 sec. 655, show the fundamental unsoundness of respondent's contention.

[6] The summary judgment opinion, notwithstanding that the District Court's attention had been called to the 1896 records, erroneously states that "Subsequent to dismissal of the suit [in 1939], it was learned that Hoover instead of being a bona fide non-assenting shareholder, had actually participated in the reorganization, voting some of his stock in favor of the reorganization." (R. 17, 122 F. Supp. at p. 255). The error of this statement stands undisputed.

ponent Lishman concerning whether the plaintiff committee had a copy of the unprinted exhibit, the plaintiff committee had no copy thereof. Subsequently it discovered a copy in the files of Mr. Boylan, who in 1939 as counsel for Hoover, made the motion to restore the case to the calendar after it had abated in 1904. The District Court's attention was called to these matters, a copy of the suppressed exhibit was handed up to the court, and the argument made before it: (1) that this legislative exhibit was prepared in 1926 from respondent's 1896 records and established that Hoover was not a dissenter; (2) that in 1939 Mr. Boylan, counsel for Hoover, had a copy of this document in his files; (3) that this material evidence was suppressed from the court in 1939 (R. 36, 19) and the court's 1939 decision was based upon ignorance of the fact that prosecution of the Hoover suit had abated in 1904 because Hoover had no standing to sue; and (4) that this exhibit was not discovered by the petitioners until after the taking of the deposition, when its significance had been forced home upon them by respondent's lengthy questioning of deponent Lishman as to whether the plaintiff committee had a copy of same. (R. 36).

2. Lack of Substantive Due Process and Statutory Nullification. The decision below that petitioners are not entitled to an adjudication of their property rights inherent in shares of stock in the Federal railroad corporation is directly contrary to the provisions in the federal statute and is in direct conflict with the decisions of this Court pertaining to: the scope of the judicial function; the fiduciary duty of a majority stockholder to the minority; the limitations upon the power of a railroad corporation to transfer its charter and franchises to the 97% stockholder therein, where no provisions have been made for the minority, although the assets were ample to reach them; and the incompetency of the transferee, in the absence of legislative authorization, to arrogate to itself the position of lawful ownership and enjoyment of a railroad charter and franchises.

a. The provisions contained in section 3 of the Act of July 2, 1864, (Pet. 1, Appendix B, pp. 24a, 25a): (1) vest petitioners with continuing property rights in the charter and franchises of the Federal railroad corporation, (2) prohibit the Federal corporation from transferring same and (3) render respondent incompetent to acquire and use them (R. 12-15).

In *United States* v. *Northern Pacific Railroad Company*, 8 Cir., 1899, 95 Fed. 864, aff'd 177 U.S. 435 (1900), it was determined that the main line of the railroad must, under section 3, be owned and operated by the Federal corporation, with continuing property rights in the original stockholders and their successors. At pages 876, 877 the Court of Appeals said:

> " . . . *These restrictions upon this consolidation, confederation, and association mark one of the primary objects, and insure the accomplishment of one of the great purposes, of the charter, namely, that a single corporation, the corporation created by that charter, should, in the end, own and operate a continuous railroad from Lake Superior to Puget Sound, and be subject to the call of the government* to transport its mails, its troops, and its munitions of war, and to discharge the other duties imposed by the act. The government did not make this land grant or propose to confirm or convey it to the lessee or part owner of the disjointed fragments of other railroads, but to the owner of an entire continuous railroad. It was to this end that congress studiously inserted in this proviso, not that the railroad having the previous grant might lease its railroad to the Northern Pacific Company, or rent or buy a portion of that of the Northern Pacific Company, but that it might assign its interest to that company, or might consolidate, confederate, and associate with it on the terms mentioned in the first section of the act. It might assign its railroad to the Northern Pacific Company, and thereby that company would become the absolute owner of it, or it might unite with the Northern Pacific Company on the terms mentioned in the first section of the latter's charter, and, if it did

> unite with it on those terms, the same result would follow. In either event, the Northern Pacific Company would become the absolute owner of the road of the company having the previous grant. What were the terms mentioned in the first section of the act? They were, when read in connection with the proviso in the third section, *that the company having the previous grant might become consolidated, associated, and confederated in some lawful way with Richard D. Rice and the other parties there named, or with their successors,* 'in a body corporate and politic under the name, title, and style of the Northern Pacific Railroad Company,' and that its interest should be represented by a proper proportion of the $100,000,000 capital stock authorized by that section. It was an inexorable condition of the exercise of the power of assignment or of union conferred by the second proviso in section 3 of this charter that the ownership of the railroad having the previous grant should be vested in the Northern Pacific Railroad Company." (Emphasis supplied).

See, *Roberts* v. *Northern Pacific Railroad Company*, 158 U.S. 1, 19-21, 23, 24 (1895), holding that the railroad must be operated as a continuous line by the federal corporation.

The manifest error of the decision below overriding the statute is heightened by two facts. First, the summary judgment opinion, accepted respondent's thesis (R. 40, 56) that it was not proper to consider whether respondent had present lawful title to the Federal corporation and its assets and excluded this basic issue from the proceedings. Second, since the summary judgment and the first denial of certiorari, respondent has continued to notify petitioners of stockholders' meetings of the Federal corporation. The decision below is that respondent may continue to take under the act and repudiate its obligations. This is error and is in direct conflict with: *Calhoun* v. *Massie*, 253 U.S. 170, 177 (1920) and *Northern Pacific Railway Company* v. *U.S.*, 330 U.S. 248, 257 (1947).

b. The decision below is in direct conflict with the decisions of this Court respecting the scope of the judicial function.

The courts have no power to nullify the provisions in a statute embodying an important legislative program. *Oregon & California Railroad Co.* v. *U.S.*, 238 U.S. 393, 427 (1915), *U.S.* v. *Darby*, 312 U.S. 100, 115 (1941), see *Anderson* v. *Abbott*, 321 U.S. 349, 366, 367 (1944).

c. The decision below is in direct conflict with *Central Transportation Company* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 45, 47-49 (1891) and with other decisions of this Court holding that a railroad franchise may not be transferred without legislative authorization; and with *Chesapeake & Ohio Ry. Co.* v. *Miller*, 114 U.S. 176, 183-186 (1885) and with other decisions of this Court holding that the statutory privilege of tax exemption on a railroad right of way cannot be transferred at a foreclosure sale.

According to the decision in *Northern Pacific Railway Co.* v. *Boyd*, 228 U.S. 482, 502 (1913) the foreclosure transfer herein was a voluntary transfer under a private agreement. The reorganization was nominal and respondent was not a bona fide purchaser for value. See Appendix C, infra, p. 33.

3. Equitable Considerations and Respondent's Inconsistent Positions. The decision below sanctions findings of disputed material fact in a summary judgment opinion and the assessment of costs against petitioners for the printing of a mass of misleading and nonevidentiary material designated for printing in the appeal record by the respondent. Petitioners contended that this printing was unnecessary, would expose petitioners to the risks of excessive costs and a misleading and excessively long appellate record (R. 51). The Court of Appeals, as noted above, denied the motion to exclude this material from printing without prejudice. We urge that this Court

should now exercise its corrective powers herein. Insistence upon procedural regularity, as stated by Mr. Justices Holmes and Brandeis, has been a large factor in the development of our liberty. The serious procedural and substantive irregularities in the present case outweigh, we believe, the predisposition which appellate courts must, in most all cases, have in favor of the propriety of a trial judge's action. (See dissenting opinion of Mr. Justice Frankfurter in *Sacher* v. *U.S.*, 343 U.S. 1, 32 (1952).

Unscrupulous loading of a record with nonevidentiary material and the amercing of the cost thereof against its victim should not be tolerated. Now is the time, to use the words of Mr. Justice Cardozo, when this Court should speak out and remind us of the rules of the game we are playing.

Entering into equitable consideration also is the fact that petitioners have been denied a day in court to test their rights under a federal statute upon the motion of respondent whose rights are based upon the same statute.

The decision of the court below ignores the rule that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

4. Importance of the Case. The decision of the Court below did not afford the protection to petitioners' rights required by the due process clause. Petitioners are not seeking to relitigate issues already tried and decided. They are seeking opportunity to litigate the genuine issues of material fact and law raised by the pleadings and discarded from the summary judgment proceedings.

Respondent protested against the unfairness, because of the deaths of witnesses, of having to go to trial. However, it has been permitted to load the record with a mishmash of non-evidentiary material (from the reading of

which any appellate judge should properly shrink) practically all of which was hearsay, double hearsay and the words of persons long dead. Everything from ancient newspaper clippings to the proverbial kitchen sink was dumped into the record for identification by the respondent and has been used, despite petitioner's efforts, to enable it to escape being called to the bar of justice.

The decision of the court below denies petitioners a day in court to vindicate their rights under a federal statute. The requirement in Rule 56 that the moving party must be entitled to judgment as a matter of law has been ignored. The statute vests petitioners with a present property interest in the Federal corporation's assets.

Respondent, however, succeeded at the District Court level in excluding from this case: (a) the present effect of the federal statute, (b) whether the Federal corporation now owns valuable franchise and other assets, (c) whether respondent is lawfully entitled to enjoy the use of these assets without making provision for the minority stock, (d) whether respondent has conducted its affairs in deference to the ultimate property right of the minority and (e) whether it has misused the forms of legal procedure to hinder and prevent effective litigation against it.

The foregoing issues (R. 8, 9, 15, 39, 40, 54-58) were eliminated from the case by the District Court's refusal to consider items (d) and (e) and its acceptance of the contentions that the question of respondent's title to the federal railroad franchise was not involved in the summary judgment proceedings and that it was "not in order" for the court to consider the present effect of the federal statute (R. 40, 56). This exclusion of the effect of the statute and of fundamental matters set forth in the complaint carried with it also the exclusion of directly applicable Supreme Court cases holding that the defense of laches is not available to enable one to acquire, or to have the benefit of, title to property which he is pro-

hibited from acquiring by statute. Among the cases thus set at naught are: *Oregon & California R.R. Co.* v. *U.S.*, 238 U.S. 393, 427 (1915) and *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922).

In the Court of Appeals, and in this Court in its opposition to our first petition for certiorari, respondent asserted that the matters (a) to (d) in the second preceding paragraph above had been the subject matter of adversary contest and adjudication in the District Court. The present record contains undisputed matter establishing that this materially prejudicial assertion is contrary to fact (R. 38-40, 64, 65).

In the interest of justice, respondent should not be permitted to lead the District Court to find that it was unnecessary and not in order to consider and determine the franchise and other questions presented by the complaint, and then to contend in the appellate courts that these matters had been the subject of adversary litigation and determination in the courts below. See Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946).

According to reports in newspapers and financial journals, published since this case was last here, respondent is in process of merging with two other railroad corporations. In the pending merger the fact that Congress, as pleaded in the complaint herein, has four times refused to authorize respondent as the successor to the federal corporation and its franchises will be of importance. The statutory provisions against consolidation of the main line of federal railroad, noted above p. 19, will also be vital factors. The public policy underlying the requirement that the main line of federal railroad be owned and operated as a continuous line by the federal corporation, (*Roberts* v. *Northern Pacific Railway Company*, 158 U.S. 1, 19-21, 23, 24), will undoubtedly be the subject of concern to state and federal governments as well as to shippers and the public generally.

The nature and extent of the federal corporation's assets; whether the respondent has title to, or can lawfully dispose of same; whether respondent, as 97% stockholder, is entitled to execute agreements or releases on behalf of the federal corporation and to receive and keep the consideration which may be paid for the federal corporation's franchises—are matters all left hanging in abeyance by the decision of the court below. Adjudication of these issues raised by the pleadings herein is important not only to the petitioners but to all participants in any merger and to the proper administration of justice.

Granting relief to the petitioners from the operation of the undisputedly erroneous summary judgment will correct a manifest injustice and also serve the public interest in other important respects.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. LISHMAN,
Counsel for Petitioners.

January 1957.

APPENDIX A

CONSTITUTION, STATUTE AND RULES

U. S. CONSTITUTION, AMENDMENT V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED:

The Act of July 2, 1864, 13 Stat. 365, as amended, is printed at pp. 20 a et seq. in Appendix B to the Petition for writ of Certiorari in No. 299, 350 U.S. 844. Rule 56 of the Federal Rules of Civil Procedure is printed in the same Appendix at pp. 38a, 39a.

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 26. Depositions Pending Action

(a) When Depositions May Be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be

taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. As amended Dec. 27, 1946, effective March 19, 1948.

(b) Scope of examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. As amended Dec. 27, 1946, effective March 19, 1948.

(c) Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43(b).

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) Objections to Admissibility. Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction

in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

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(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 60. Relief from Judgment or Order.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. As amended Dec. 27, 1946, effective March 19, 1948.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949.

APPENDIX B

OPINION AND JUDGMENT BELOW

Opinion in *George A. Landell, etc., et al.* v. *Northern Pacific Railway Company,* United States Circuit Court of Appeals for the District of Columbia Circuit, October 11, 1956. Before Prettyman, Bazelon, and Bastian, Circuit Judges.

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PER CURIAM: This case is here a second time. The District Court (Judge Tamm) originally held the action barred by *laches,* rendering a careful opinion upon the point.[1] Landell appealed, and this court affirmed.[2] Certiorari was sought but was denied.[3] The mandate of this court issued, and the District Court entered judgment upon it. In doing so it assessed costs. Landell appealed from that judgment, using as procedural justification the feature of costs. Once here, however, he bases the merits of the appeal upon alleged flaws in the findings and other premises upon which the original judgment was based. Those questions are no longer open. Of course a judgment in the posture of this one may be attacked for fraud in its procurement. While appellant clothes his attack in language appropriate to such an issue, no fact remotely suggesting any such infirmity in the present judgment appears here.

The order of the District Court upon the mandate of this court is

Affirmed.

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[1] 122 F.Supp. 253 (1954).

[2] 96 U.S. App. D.C. 24, 223 F.2d 316 (1955).

[3] 350 U.S. 844, 100 L.Ed. —, 76 S.Ct. 85 (1955).

Order in *George A. Landell, etc., et al.* v. *Northern Pacific Railway Company,* United States Circuit Court of Appeals for the District of Columbia, dated November 19, 1954. Before Stephens, Chief Judge, Bazelon and Danaher, Circuit Judges.

* * * *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court on the mandate of this Court, appealed from in this cause, be, and the same is hereby, affirmed.

It is FURTHER ORDERED by the Court that appellee herein recover from appellants its taxable costs on this appeal and have execution therefor.

Dated: October 11, 1956

Per Curiam.

ORDER

This case came on for consideration on appellants' motion to exclude from printing in the joint appendix certain material designated by appellee, and was argued by counsel. Counsel for appellee having orally stated he will print such material in a separate appendix to appellee's brief, it is

ORDERED by the Court that the aforesaid motion be, and it is hereby, denied, without prejudice to the right of counsel for appellant to file a motion to tax costs for printing unnecessary portions of the record after hearing and disposition of this appeal. See Blake v. Trainer, 79

U.S. App. D.C. 362, 148 F.2d 10, 12. Also see Belt v. Holton, 197 F. 2d 579, 90 U.S. App. D.C. 148.

Per Curiam.

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APPENDIX C

Excerpt from "Public Aids to Transportation", Section of Research, Federal Coordinator of Transportation, G.P.O. (1938) vol. 2, page 102.

"In some instances, changes in ownership have resulted from the consolidation of two or more railway companies, stock in new companies having been issued to the stockholders in the old companies in lieu of stock in the latter; in other instances, they have resulted from private sales of the properties; and frequently they have resulted from foreclosure sale. A brief discussion, necessarily couched in abstract terms, of what happens under these circumstances will be helpful.

Any change in ownership, other than a nominal one, involves a valuation of the assets of the acquired company in terms of future earning power and of the liabilities taken over in terms of obligations to be met. The aids which a corporation receives would be reflected in some manner in its balance sheet, whether or not they took tangible form,[44] but a new owner would take over the assets and liabilities of such corporation at a commercial valuation and in amounts which might be more or less than those at which they had previously been carried. An original stockholder of the aided corporation would continue after such change of ownership to benefit from

[44] That is, in the form of fixed assets or of their net effect on the corporate surplus or deficit.

the aid, but any person succeeding to the interest in such stock prior to the change of corporate ownership would be a purchaser for value and not a beneficiary of the aid given. As to the changes in ownership resulting from private and foreclosure sales, where the transactions were bona fide sales to new owners, the new owners would be purchasers for value and would not have benefited from the aids to the predecessor companies.

In instances, some of the lands covered by Federal or State grants to original companies have been patented to present companies. In such cases, where the ownership by the present company of the properties of the original company has resulted from a *bona fide* sale of such properties, the present company is a purchaser for value and is not a beneficiary of the aid included in the land grant to the original company, except where the value of such land has increased since the sale was made and such increase could not reasonably have been anticipated at the time of the sale.

However, it is a matter of common knowledge that the changes in ownership of railway properties resulting from private or foreclosure sales have often been changes in name only, the stockholders of the old company being the owners of the stock of the new company. The succession, through purchase at foreclosure sale, by the Northern Pacific *Railway* Co., a present company, in 1896 to the properties of the Northern Pacific *Railroad* Co., which was the beneficiary of a large Federal land grant, furnishes an example of a nominal change in ownership. In *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, wherein the validity of this sale as to a nonassenting creditor was in issue, the Supreme Court said (pp., 502, 506):

'Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business

with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, *such a transfer by stockholders from themselves to themselves cannot defeat the claim of a nonassenting creditor.* As against him the sale is void in equity, regardless of the motive with which it was made. * * * There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree. * * * As between the parties and the public generally, the sale was valid. *As against creditors, it was a mere form. Though the Northern Pacific Railroad was divested of the legal title, the old stockholders were still owners of the same railroad, encumbered by the same debts. The circumlocution did not better their title against Boyd as a nonassenting creditor. They had changed the name but not the relation.* The property in the hands of the former owners, under a new charter, was as much subject to any existing liability as that of a defendant who buys his own property at a tax sale.' [Italics supplied.] [45]

Where there has been no real change in ownership in the succession of present companies to the properties of companies which received public aids, the present companies are beneficiaries of the public aids to the same extent as were the original companies."

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[45] It may be noted that the bulk of the acreage received by predecessors of the Northern Pacific *Railway* Co. was received by the Northern Pacific *Railroad* Co.